Supreme Court, U.S.
FILED
MAR 10 2000
CLERK

(2)

No. 99-1354

IN THE

Supreme Court of the United States

RED MENDOZA,

Petitioner,

v.

BORDEN, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

WESLEY R. PARSONS
Counsel of Record
JONATHAN D. COLAN
ADORNO & ZEDER, P.A.
2601 South Bayshore Drive
Suite 1600
Miami, Florida 33133
(305) 858-5555

Attorneys for Respondent

158329

Counsel Press LLC
(800) 274-3321 • (800) 359-6859

STATEMENT PURSUANT TO RULE 29.6

Pursuant to Rule 29.6 of the Rules of this Court, Respondent, Borden, Inc., notifies the Court that its parent corporation is Borden Holding, Inc. (a non-publicly held company), whose parent is Whitehall Associates, L.P. a limited partnership. There is no publicly held company that owns 10% or more of the stock of Borden, Inc.

TABLE OF CONTENTS

Page

Statement Pursuant to Rule 29.6 i

Table of Contents ii

Table of Cited Authorities iii

Introduction 1

Statement of the Case 2

Reasons for Denying the Writ 3

It Is Not The Function Of This Court To Reweigh The Evidence Against The Properly Stated Rules Of Law Applied By The Lower Courts 3

A. The *en banc* Eleventh Circuit properly considered the totality of Petitioner's allegations in context 5

B. The district court and *en banc* Eleventh Circuit acted appropriately as gatekeepers to prevent these allegations, lacking in severity and pervasiveness, from reaching the jury 6

Conclusion 9

TABLE OF CITED AUTHORITIES

Page

Cases:

Faragher v. City of Boca Raton, __ U.S. __, 118 S. Ct. 2275 (1998) 1, 4, 6, 7

Harris v. Forklift Sys., Inc., 510 U.S. 17 (1993) .. 1, 4, 6

Hopkins v. Baltimore Gas & Elec. Co., 77 F.3d 745 (4th Cir. 1996) 7

Mendoza v. Borden, Inc., 195 F.3d 1238 (11th Cir. 1999) ..... *passim*

Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57 (1986) 3

Oncale v. Sundowner Offshore Serv., Inc., __ U.S. __, 118 S. Ct. 998 (1998) 1, 4, 6, 7, 8

Quinn v. Green Tree Credit Corp., 159 F.3d 759 (2d Cir. 1998) 7

Sprague v. Thorn Americas, Inc., 129 F.3d 1355 (10th Cir. 1997) 8

Rules:

United States Supreme Court Rule 10 1

United States Supreme Court Rule 15 2

INTRODUCTION

This Petition demonstrates the wisdom of the admonition in this Court's Rule 10 that a "petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." The district judge who heard all the testimony and reviewed all the evidence presented at the trial of this hostile work environment sexual harassment action properly exercised her gatekeeper function under *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 23 (1993), and entered judgment as a matter of law in Respondent's favor.[1] The *en banc* Eleventh Circuit reinstated that judgment, *Mendoza v. Borden, Inc.*, 195 F.3d 1238 (11th Cir. 1999), overturning a contrary panel decision, in compliance with this Court's statements in *Faragher* that judgment as a matter of law should be granted in favor of employers to filter out claims lacking objective evidence of extreme and pervasive discriminatory conduct. *See Faragher v. City of Boca Raton*, __ U.S. __, 118 S. Ct. 2275, 2284 (1998). That the Petitioner may not agree with the circuit court's application of the properly stated rules of law announced in this Court's *Harris*, *Faragher*, and *Oncale*[2] decisions is not a reason for this Court to grant certiorari to reconsider the evidence for itself.

---

1. The district court's unpublished Order is reprinted in the Appendix to Petition ("Pet. App.") at 105-36.

2. *Oncale v. Sundowner Offshore Serv., Inc.*, __ U.S. __, 118 S. Ct. 998 (1998).

STATEMENT OF THE CASE

Pursuant to Rule 15 of this Court, Respondent offers this clarification of the evidence at the trial of this action.

Petitioner alleged that during the eleven months she was supervised by Daniel Page, the comptroller at Respondent's Miami plant, he looked her up and down from across a room while "making a sniffing motion" *on three occasions*, "rubbed his right hip against [her] left hip" while passing her in the hall *on one occasion*, and *once* responded to her comment when she entered his office and announced that she "came in here to work, period" by saying, "Yeah, I'm getting fired up, too." *Mendoza*, 195 F.3d at 1242-43. Petitioner alleged no other incidents of physical contact or harassing statements by Page. *See id.* at 1243. The only other evidence Petitioner offered regarding the eleven months that she and Page worked together was that, in her words, Page was "constantly watching me and following me around." *Id.* at 1242. Though she used the word "constantly" during her trial testimony, in her deposition testimony — which was also introduced at trial — she described Page's conduct in these terms:

> Q. The second thing you mentioned was that Dan Page followed you all over the place.
>
> A. Yes, he did, several times. This happened *several times, two, three times that I can remember*. I would go to the routeman's room reference paperwork. And when I would come out, go to the left to go back to my office, he would be at the end of the hall and watching me and smiling at me.

Id. at 1257 (Carnes, J., concurring) (emphasis added). While embellishing and magnifying Page's conduct in her trial

testimony, Petitioner conceded that it never occurred in the office part of the plant, where she worked, but was confined to the hallways, lunch room, or picnic tables outside. *See id.* at 1249. Her complaint was simply that Page sometimes showed up when she happened to be at these locations. *See id.* Petitioner never claimed Page "stalk[ed]" her, "leer[ed]" at her, or "threaten[ed]" her in any manner. *See id.* Petitioner introduced no evidence to suggest that Page treated other employees, male or female, any differently. *See id.* at 1253-54 (Edmondson, J., concurring).

REASONS FOR DENYING THE WRIT

IT IS NOT THE FUNCTION OF THIS COURT TO REWEIGH THE EVIDENCE AGAINST THE PROPERLY STATED RULES OF LAW APPLIED BY THE LOWER COURTS

Both the district judge and the *en banc* Eleventh Circuit properly stated the controlling rules of law regarding the necessary *prima facie* showings for hostile work environment liability, and Petitioner's disagreement with the conclusions mandated by the application of those rules to the evidence introduced at trial does not provide grounds for *certiorari* review by this Court.

The district court properly noted that "[i]n order to be actionable, the harassment must have subjectively and *objectively* affected a 'term, condition, or privilege' of employment in that it was 'sufficiently severe or pervasive to alter the conditions of (the victim's) employment and create and [sic] abusive working environment' " (Pet. App. at 121-22) (citing *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57 (1986) (emphasis in original)). The court further recognized that

> [t]he determination of "whether an environment is hostile or abusive can be determined only by looking at all the circumstances, [including] the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance."

(Pet. App. at 122) (quoting *Harris*, 510 U.S. at 23). The court summarized all of the conduct Petitioner alleged (Pet. App. at 120) and concluded that the incidents "were neither physically threatening nor humiliating [and that] their frequency and severity were insufficient to create a hostile or abusive environment" (Pet. App. at 122). The court held that as a whole "the incidents to which Mendoza testified do not provide a basis upon which a jury could reasonably conclude that harassment was sufficiently severe or pervasive to affect a term, condition, or privilege of Mendoza's employment" (Pet. App. at 122-23).

The Eleventh Circuit's *en banc* opinion likewise properly stated this Court's controlling guidelines from *Harris*, *Faragher*, and *Oncale*, including the admonition that "courts should examine the conduct in context, not as isolated acts, and determine under the totality of the circumstance whether the harassing conduct is sufficiently severe or pervasive to alter the terms or conditions of the plaintiff's employment." *Mendoza*, 195 F.3d at 1246. After having first laid out all of Petitioner's allegations in detail, *see id.* at 1242-44, the court analyzed the allegations in context and concluded that "the conduct alleged by [Petitioner] falls well short of the level of either severe or pervasive conduct sufficient to alter [her] terms or conditions of employment." *Id.* at 1247.

A. The *en banc* Eleventh Circuit properly considered the totality of Petitioner's allegations in context

Contrary to Petitioner's contention (Pet. at 8), the court did not hold that each allegation must be examined individually, nor did the court examine each allegation in that manner. Rather, the court considered how the totality of Petitioner's allegations should be viewed in context, focusing on the character, severity, and pervasivesness of the offensive conduct. "[C]onsidering the following and staring described by Mendoza with and in the context of the sniffs, one verbal statement, and one slight touching as Page walked by the fax, we find Mendoza's claim still falls far short of actionable hostile environment sexual harassment." *Id.* at 1249. The court compared this conduct, *see id.* at 1247-48, to the totality of conduct in other cases determined by other circuits to be sufficient or insufficient to state a claim for hostile work environment discrimination, *see id.* at 1248-50, and warned that "[w]ere we to conclude that the conduct established by [Petitioner] was sufficiently severe or pervasive to alter her terms or conditions of employment, we would establish a baseline of actionable conduct that is far below that established by other circuits." *Id.* at 1251. After completing its analysis and comparison, the court concluded that the district court did not err in granting judgment as a matter of law in Respondent's favor.

In her Petition at 8, Petitioner faults the Eleventh Circuit for "looking at each event of harassment in a vacuum . . . [i]nstead of looking at the totality of the circumstances."[3]

3. In her Question Presented, however, Petitioner acknowledges that the district court did look at the totality of the circumstances subsequent to examining the individual incidents (Pet. at i, ¶ 3).

Petitioner failed to explain, however, how the court could be expected to examine the totality of the circumstances without considering the individual allegations that made up the circumstances. Before the total circumstances may be scrutinized, they must be described. This Court is concerned with how the allegations are to be judged—in context and within the totality of the circumstances—not whether examination of individual incidents forms part of this judgment.

No end would be served by this Court's re-application of the controlling standards to these facts other than to place the stamp of this Court's approval or disapproval on the sufficiency of a particular set of allegations to reach the jury. This Court has acknowledged that it cannot provide a "mathematically precise test" of what facts would mark the boundary of what is actionable, *see Harris*, 510 U.S. at 22-23, and it should not attempt to do so in this case. Further review of these facts can provide no generally applicable guidance to the lower courts beyond the standards already announced in *Harris*, *Faragher*, and *Oncale*. This Court expressed confidence in the lower courts' ability to act as gatekeepers guarding against frivolous claims, and Petitioner has offered no reason why this Court should recede from that stance now.

B. The district court and *en banc* Eleventh Circuit acted appropriately as gatekeepers to prevent these allegations, lacking in severity and pervasiveness, from reaching the jury

The "recurring point" in this Court's hostile work environment discrimination cases is that "simple teasing, . . . offhand comments, and isolated incidents (unless extremely serious) will not amount to discriminatory changes in the

'terms and conditions of employment.' " *Faragher*, 118 S. Ct. at 2283 (citation omitted). This Court stated that this and other guidelines must be properly applied to "filter out complaints" in order to ensure that "Title VII does not become a 'general civility code.' " *Id.* (quoting *Oncale*, 118 S. Ct. at 1002). The district court judgment and *en banc* Eleventh Circuit opinion correctly followed this Court's guidelines to keep this claim from reaching the jury. *See id.* at 2284 ("We have made it clear that conduct must be extreme to amount to a change in the terms and conditions of employment, and the Courts of Appeals have heeded this view.").

Both the district court (which heard the testimony) (Pet. App. at 120-22) and the *en banc* Eleventh Circuit (which exhaustively reviewed the record) determined that Petitioner failed to present a *prima facie* case of severe and pervasive conduct altering the terms and conditions of her employment. *See Mendoza*, 195 F.3d at 1248-49, 1253. "First and most importantly, Mendoza did not present evidence that Page's conduct was 'physically threatening or humiliating' or that the cumulative effect of this conduct 'unreasonably interfered' with Mendoza's job performance." *Id.* at 1248. Next, the Eleventh Circuit noted that none of the conduct alleged by Mendoza could be considered severe, because "[e]ven if somehow offensive, Page's statement 'I'm getting fired up,' the three sniffing sounds, the one instance of physical conduct, and the following/staring are much less severe than the incidents of sexual banter and inappropriate touching described, and found insufficient, by the Second Circuit . . . and the Fourth Circuit." *Id.* at 1249 (citing *Quinn v. Green Tree Credit Corp.*, 159 F.3d 759 (2d Cir. 1998), and *Hopkins v. Baltimore Gas & Elec. Co.*, 77 F.3d 745 (4th Cir. 1996)). Finally, the court concluded that despite Petitioner's trial testimony characterizing Page's following and staring as constant, "the conduct asserted by

Mendoza was not frequent." *Id. See also id.* at 1256-57 (Carnes, J., concurring) (mere subjective perception of the following as constant does not suffice as objective evidence of pervasiveness, especially in light of Petitioner's more restrained deposition testimony). "She established a single instance of slight physical contact, one arguably inappropriate statement, and three instances of Page's making a sniffing sound. These incidents occurred over an eleven-month period and therefore were too infrequent to alter the conditions under which Mendoza was required to perform her job." *Id.* (citing *Sprague v. Thorn Americas, Inc.*, 129 F.3d 1355 (10th Cir. 1997)). The allegedly offensive conduct was insufficiently severe or pervasive, viewed in total and in context, to raise an inference of discrimination.

Moreover, Judge Edmondson's concurrence noted the absence of anything in the record "suggest[ing] that other employees, including men, were treated differently." *Id.* at 1253 (Edmondson, J., concurring). This Court has emphasized that "[t]he critical issue" in Title VII cases "is whether members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed." *Oncale*, 118 S. Ct. at 1002 (citation omitted).

In *Oncale*, this Court charged both juries and the courts with the obligation to use "[c]ommon sense, and an appropriate sensitivity to social context" to distinguish "conduct which a *reasonable person* in the plaintiff's position would find severely hostile or abusive." *Id.* at 1003 (emphasis added). The district court and the *en banc* Eleventh Circuit honored their obligations and prevented this claim—lacking a *prima facie* baseline of objective evidence of a discriminatory hostile work environment—from reaching the jury.

CONCLUSION

For the reasons stated, this Court should deny the Petition.

Respectfully submitted,

WESLEY R. PARSONS
Counsel of Record
JONATHAN D. COLAN
ADORNO & ZEDER, P.A.
2601 South Bayshore Drive
Suite 1600
Miami, Florida 33133
(305) 858-5555

Attorneys for Respondent